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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1620

BRENDAN SULLIVAN,

Petitioner,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

ARGUMENT—Petitioner has received a fair hearing. The evidence at the hearing fully supported the respondent's decision to dismiss petitioner. Due process did not require that petitioner be restored to respondent's payroll prior to the commencement of the disciplinary hearing 4

CONCLUSION 6

Cases Cited

Amkraut v. Hults, 21 AD2d 260 (1st Dept., 1964), aff'd 15 NY2d 627 (1964) 5

Arnett v. Kennedy, 413 U.S. 134 (1974) 5

Statute Cited

New York Civil Service Law, Section 75 ..... 2, 4, 5

Rule Cited

New York City Civil Service Commission Rules and Regulations, Rule 6.4.6 ..... 2, 4

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Statement of the Case

The petitioner, Brendan Sullivan, was employed by the respondent on February 7, 1966, in the title of caseworker, a competitive civil service position (15).*

* Numbers in parentheses refer to pages in the Record on Appeal submitted by petitioner (there appellant) to the New York Court of Appeals.

THROUGH

Beginning on October 26, 1971, petitioner was absent from work. By letter dated December 23, 1971, respondent attempted to notify petitioner that, pursuant to Rule 6.4.6 of the New York City Civil Service Commission, his absence since November 23 was deemed to constitute a resignation from his position (27). This letter was sent by certified mail, return receipt requested. It was returned on January 13, 1972, marked, "unclaimed", although the Post Office made four attempts to deliver it and left a notice at petitioner's address (28). When petitioner subsequently requested reinstatement to his position in March of 1972, the request was denied by respondent.

On April 28, 1972, petitioner commenced a proceeding under Article 78 of the New York CPLR to review respondent's determination that he had resigned pursuant to Rule 6.4.6, and for related relief.

On January 11, 1973, a judgment was entered in this proceeding signed by Mr. Justice Frank of the New York Supreme Court granting petitioner's application "only to the extent that this matter is remanded to respondent, for a full and fair hearing as provided for in Section 75 of the Civil Service Law" (99). In an accompanying opinion, Mr. Justice Frank stated that "even though a petitioner is being removed from the civil service through a device denominated a 'resignation', the latter is, in fact, being discharged from employment for alleged misconduct upon his part" (37). This judgment was not appealed by either party.

Unsuccessful settlement negotiations followed. Petitioner then commenced another Article 78 proceeding demanding the same relief requested in his first proceeding. This proceeding resulted in the order of Justice Gellinoff, dated April 11, 1973, which conditionally granted

the petition unless within ten days respondent conducted the hearing mandated by the order of Justice Frank (49).

Pursuant to this order, respondent caused charges and specifications to be served on petitioner. These charges and specifications set forth alleged excessive latenesses and excessive absences by petitioner in violation of departmental rules and regulations, and alleged that petitioner "absented himself from October 16, 1971 to March 9, 1972 without authorization . . ." (54).

A hearing was held on May 11, 1973. Petitioner's attorney made a "special appearance" to contest the jurisdiction of the respondent to hold the hearing, and then left the hearing. The basis of petitioner's jurisdictional objection was the fact that he was then not on the respondent's payroll. The hearing proceeded in the absence of the petitioner and his attorney.

Every facet of respondent's case was proven by documentary proof and testimony of disinterested senior employees. Petitioner's personnel records were introduced into evidence and interpreted by an expert witness. These records indicated petitioner's absences and latenesses during the period covered in the specifications (74-76). Proof was submitted that petitioner had not tendered a medical statement to respondent until after four and one-half months of absence, contrary to department rule (78).

The Hearing Officer found that all the specifications were established and recommended dismissal. By order of the Commissioner, petitioner was dismissed from the Department.

Petitioner then moved to make the previous order of Justice Gellinoff the final judgment in this matter, claiming that the hearing conducted by respondent did not

comply with the previous orders of the Court. This application was denied by Justice Gellinoff and the petition dismissed by an order and judgment dated October 3, 1973. The New York Appellate Division, First Department, unanimously affirmed the judgment "without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay." 44 AD2d 672. The New York Court of Appeals unanimously affirmed the order of the Appellate Division, holding that there had been "no showing that appellant was deprived of a fair hearing . . .". This decision is reported at 36 NY2d 766.

ARGUMENT

Petitioner has received a fair hearing. The evidence at the hearing fully supported the respondent's decision to dismiss petitioner. Due process did not require that petitioner be restored to respondent's payroll prior to the commencement of the disciplinary hearing.

Petitioner's first claim is that Rule 6.4.6 of the Rules and Regulations of the New York City Civil Service Commission is constitutionally invalid because it does not provide for a hearing prior to a determination that an employee has resigned his position. Petitioner raised this claim in the New York courts and was successful. The order of Justice Frank, and the subsequent order of Justice Gellinoff, directed that petitioner be served with written charges and specifications of misconduct and that he be afforded a hearing as prescribed by Civil Service Law Section 75. Implict in these orders is the determination that respondent's application of Rule 6.4.6 to petitioner was a nullity. Under these circumstances, we submit that the constitutionality of this rule is not properly before this Court.

In order to comply with the two court orders and with the provisions of Section 75, respondent gave to petitioner written notice of the proposed disciplinary action and a copy of the charges preferred. Petitioner has not demonstrated why respondent should have been bound to prefer only charges related to petitioner's unauthorized absence beginning on October 26, 1971. The additional charges preferred related to petitioner's excessive lateness and other absences. As a matter of New York law, such charges were entirely proper.

The respondent clearly had jurisdiction to hold the hearing based on the orders of the New York courts that had been obtained by petitioner. Furthermore, Section 75 of the Civil Service Law does not require that an employee be reinstated to his position before a hearing can be conducted. Subdivision (3) of Section 75 limits suspension without pay to a period not exceeding 30 days, but it does not prohibit suspension for a longer period, nor does it mandate reinstatement after such period, if the charges are not yet determined. *Matter of Amkraut* v. *Hults*, 21 AD2d 260, 263 (1st Dept., 1964), aff'd 15 NY2d 627 (1964). Petitioner's claim for damages for the period before the hearing when he was not allowed to work has been expressly left open by the New York courts.

As we read this Court's decision in *Arnett* v. *Kennedy*, 413 U.S. 134 (1974), petitioner was not entitled, as a matter of due process, to be restored to respondent's payroll before he could be tried at a disciplinary hearing.

In sum, petitioner has already been granted by the New York courts the relief he is requesting here, to wit, an opportunity for a full trial-type hearing prior to his termination from service. The question of damages for delay in bringing the charges is still open in New York and petitioner may raise this issue in a separate action.

CONCLUSION

The petition for a writ of certiorari should be denied.

July 15, 1975.

Respectfully submitted,

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